

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK GERALD ELLIOTT,

Defendant-Appellant.

UNPUBLISHED
February 16, 2012

No. 301186
Wayne Circuit Court
LC No. 09-024407-FC

Before: SERVITTO, P.J., and TALBOT and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second degree murder, MCL 750.317, and felonious assault, MCL 750.82. Defendant was sentenced to concurrent prison terms of 27 to 50 years for second degree murder and two to four years for felonious assault. We affirm.

Defendant first argues on appeal that the trial court erred in submitting the charge of first degree murder to the jury when the prosecutor presented insufficient evidence to establish premeditation. Though not found guilty of first degree murder, defendant argues that this error nevertheless violated his due process rights by creating a compromise verdict. We disagree.

To convict a defendant of first-degree murder, the prosecution must prove that the defendant intended to kill the victim, and that the killing was premeditated and deliberate. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Premeditation and deliberation can be shown by: (1) the relationship between the defendant and victim, (2) the defendant's actions before and after the killing, and (3) the circumstances of the killing itself. *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). Premeditation and deliberation require sufficient time to permit the defendant to “take a second look.” *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). The jury can infer premeditation and deliberation from the circumstances as long as the inferences are supported from the record and are not merely speculative. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

In this matter, the prosecution presented evidence that defendant was in a bar fight with Sylvester Green and Jimmy Tyner. The evidence indicates that when the fight was broken up, defendant was told to leave the bar and that he did, but that he remained in the area for over an hour, circling the block in his truck. Defendant eventually parked his truck in front of the bar facing the wrong way on a one-way street. Green and Tyner left the bar some time later and

approached a parked bus on foot to ask the driver for directions. At that point, defendant accelerated his vehicle down the street, striking both Green and Tyner with his truck and seriously injuring both men. Green later died as a result of his injuries. From the above, it could be reasonably inferred that defendant laid in wait for a significant period of time for the specific victims to leave the bar, and then deliberately ran them over with his truck. Defendant's actions after the bar fight and before the murder and assault supported a reasonable inference that defendant had more than enough time to take a second look at his actions. The prosecution therefore presented sufficient evidence of premeditation and deliberation. The submission of the charge of first degree murder to jury was thus not in error.

Moreover, even if we were to find that the first degree murder charge was erroneously submitted to the jury, defendant would not be entitled to relief. Defendant was not convicted of first degree murder. As the Michigan Supreme Court stated in *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998), "Where a jury acquits a defendant of an unwarranted charge . . . before convicting of a . . . lesser charge, we find that it is highly probable that the erroneous submission of the unwarranted charge did not affect the ultimate verdict." Any error regarding an unsupported charge is rendered harmless when the defendant is acquitted of the unsupported charge, as long as the defendant is actually convicted of a charge that was properly submitted to the jury. *Id.* at 486-487. Where, as here, defendant was convicted of second degree, rather than first degree murder, and defendant does not dispute that the charge of second degree murder was properly submitted to the jury, any error in submitting the first degree murder charge to the jury was harmless.¹

Defendant next argues that the trial court abused its discretion by foreclosing the jury's opportunity to review testimony of witnesses by informing the jury that the transcripts would not be available for two weeks. Because defendant waived review of this issue, we disagree.

A waiver is the intentional relinquishment of a known right. *People v James*, 272 Mich App 182, 195; 725 NW2d 71 (2006). One who waives his rights may not then seek appellate review of a deprivation of those rights; the waiver has extinguished any error. *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). A defendant may waive a broad array of constitutional and statutory rights. *People v Carter*, 462 Mich 206, 217-218; 612 NW2d 144 (2000). Although certain fundamental rights cannot be waived without the fully and publicly acknowledged consent of the defendant, other rights may be waived by counsel. *Id.*

Here, the trial court responded to the juror's request for exhibits and witness testimony with a note, stating: "All exhibits have been provided for your review. However, trial testimony of the witnesses you request would not be available in written form until October 22, 2010. You should use your collective memories regarding the trial testimony." At the end of the note, three

¹ While defendant asserts that his second degree murder conviction may have been the result of juror compromise, he has presented no evidence of the same. See *People v Johnson*, 427 Mich 98, 116, n 15; 398 NW2d 219 (1986) ("There is simply no more reason for assuming that jurors have compromised on a verdict when there is an erroneous charge than there is to believe they have simply reached a middle ground when several instructions are correctly given.").

sets of initials appear—those that correspond with the trial court, the prosecution, and defense counsel. Defendant thus did not object to the note sent to the jurors; rather, defendant (through counsel) affirmatively approved the note. A defendant does not have a right to have a jury rehear testimony; the decision rests in the discretion of the trial court. *Carter*, 462 Mich 206, 217-218. Because counsel has the authority to manage the conduct of trial, an agreement by counsel with the decision of the trial court to deny transcripts thus binds the defendant and effectuates a waiver of the issue. *Id.* Where both counsel agreed to the trial court’s denial of the jury’s request, the denial was not an abuse of discretion and defendant waived review of the issue on appeal. See, *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

Finally, defendant argues that he is entitled to resentencing because the trial court relied upon erroneous scoring of offense variable (“OV”) 1 when calculating the applicable sentencing guidelines. We disagree.

A trial court's scoring decision will be upheld if there is any evidence to support the score. *People v Harverson*, 291 Mich App 171, 179-180; 804 NW2d 757 (2010). Under the sentencing guidelines act, OV 1 is scored for the aggravated use of a weapon. *People v Lange*, 251 Mich App 247, 254; 650 NW2d 691 (2002); MCL 777.31. Scoring for OV 1 is as follows:

a) A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon	25 points
(b) The victim was subjected or exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device	20 points
(c) A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon	15 points
(d) The victim was touched by any other type of weapon	10 points
(e) A weapon was displayed or implied	5 points
(f) No aggravated use of a weapon occurred	0 points

MCL 777.31(1).

In *Lange*, 251 Mich App at 256, this Court noted that while some weapons carry their dangerous character because they are specifically designed and used to be deadly, other instrumentalities are not weapons unless turned to such purpose. The *Lange* Court also noted that the term “weapon,” is not defined in the statute itself for purposes of clarifying “any other type of weapon” but is defined in the dictionary as “any instrument or device used for attack or defense” and “anything used against an opponent, adversary, or victim.” *Id.* at 257. This Court thus concluded that if an object was used to inflict serious injury in a battery, the object could be considered a weapon for purposes of scoring OV 1. *Id.* at 254-257.

Here, defendant was found guilty of second-degree murder and felonious assault for running over his victims with his truck. Defendant therefore used the truck to attack the victims and inflict serious injury upon them. Evidence on the record therefore supports considering the truck as a weapon and the trial court's assessment of 10 points for OV 1. The trial court thus properly scored OV 1.

Affirmed.

/s/ Deborah A. Servitto

/s/ Michael J. Talbot

/s/ Kirsten Frank Kelly